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May 10, 2016

To: Judicial Branch Certification Commission (“JBCC”)

From: Craig Enoch

Re: Proposed language for amendment to Rule 17 of the Code of Professional Conduct for Certified Shorthand Reporters and Court Reporting Firms (“one-third rule”)

Previously, the Texas Deposition Reporters Association (“TEXDRA”)¹ proposed language for an amendment to the one-third rule requesting for the rule to be amended to more accurately reflect the median national market rate for deposition copies.² TEXDRA offered several justifications for the rule’s amendment, including that (1) the one-third rule negatively affects Texas court reporters throughout the marketplace because the amount reporters can charge under the rule is arbitrarily low and (2) the one-third rule is an arbitrary financial limit that is devoid of sound policy reasons.

On April 1, 2016, the court reporters advisory board of the Judicial Branch Certification Commission, which is in the process of considering and making recommendations concerning amendments to the Code of Professional Conduct for Certified Shorthand Reporters and Court Reporting Firms, met to consider whether the one-third rule should be amended. At the conclusion of the meeting, the board took a preliminary vote and decided 4-2 to either eliminate the rule or amend it in some manner. Many of those on the board who voted in favor of amending the rule voiced a belief that the standard should be more in line with one of reasonableness.

In light of the discussion and vote taken by the board, TEXDRA offers this language as a substitute for existing Rule 17, now under consideration as proposed Rule 18:

A Certified Shorthand Reporter or Court Reporting Firm may not charge more for a copy of a transcript than is charged for the original transcript, exempting charges for real-time services, expedited delivery, rough drafts, and other ancillary services that may apply to a copy but not to the original transcript.

¹ TEXDRA is an association of certified shorthand reporters and court reporting firms. The previous letter I submitted on behalf of TEXDRA (without the appendix) is attached as **Appendix A**.

² As explained in my previous letter, the one-third rule prohibits court reporters from charging “for a copy at a rate of more than one-third the per page cost of the original and first copy of a document.”

At the board meeting several concerns were discussed, including competing concerns (1) that the one-third rule sets an arbitrary cap on charges by Texas reporters in an otherwise competitive national market and (2) that some consumers, because of their strength in the market, may attempt to pressure court reporters to transfer the costs of depositions from the party contracting for reporting services to third parties through high copy rates. TEXDRA believes that its proposed language ensures a proper balance by encouraging the contracting parties to negotiate for a reasonable rate for the originals and by then limiting the amount a reporter can charge for copies to no more than the amount the reporter charges for originals. The amended rule will prevent any “backroom deals” that could potentially affect the impartiality of freelance reporters and firms.

Thank you for your consideration. Please do not hesitate to contact me should you have any questions or would like additional explanation.

Respectfully,

/s/ Craig T. Enoch
Craig T. Enoch

cc: Bill Aleshire

APPENDIX A



Craig T. Enoch
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June 15, 2015

To: Judicial Branch Certification Commission (“JBCC”)

From: Craig Enoch

Re: Proposed amendment to Rule 17 of the Code of Professional Conduct for Certified Shorthand Reporters and Court Reporting Firms

The Texas Deposition Reporters Association (“TEXDRA”), an association of Certified Shorthand Reporters and Court Reporting Firms,¹ requests that the JBCC recommend to the Texas Supreme Court that current Rule 17 of the Code of Professional Conduct for Certified Shorthand Reporters and Court Reporting Firms, which prohibits court reporters from charging “for a copy at a rate of more than one-third the per page cost of the original and first copy of a document” (the “one-third rule”), be replaced with the following:

Not later than January 1 of each even-numbered year, the JBCC shall establish the maximum rate a CSR or CRF may charge for copies. The rate must be set at the median national market rate for deposition copies. The JBCC shall determine that rate by conducting a survey of the median rates for copies within the top ten populous states, and then calculating the median rate among those states combined. A CSR or CRF shall not charge for a copy at a rate that is more than the rate established by the JBCC.²

TEXDRA recently authored an iPetition to gauge support for amending the one-third rule by the Texas court reporting community. The petition was online for approximately four weeks and, with very little promotion other than word-of-mouth, quickly gathered over 450 signatures in support of amending the rule.

The one-third rule, approved by the Texas Supreme Court in 1995, is outdated. Litigation, though declining in Texas courts, has been continually expanding in alternative dispute settings throughout the country and internationally. Current Rule 17 is also inconsistent

¹ The Code uses the abbreviations CSR for Certified Shorthand Reporters and CRF for Court Reporting Firms. In this letter, these terms are collectively referred to as “court reporters.”

² Though the Code refers to the Court Reporters Certification Board (“CRCB”) as the board that regulates court reporters, this entity has since been replaced with the JBCC. As such, the proposed rule uses the term JBCC.

with Texas's free-market public policy.³ Demand for freelance court reporting is high, but Texas court reporters, bound by an ethics rule to this fixed copy rate, are at a severe competitive disadvantage not imposed on other court reporters throughout the world. The proposed amendment maintains the ethical obligation to charge a reasonable rate, but aligns the ethical obligation with rates recognized by the market as reasonable. There are two primary reasons the rule should be amended:

First, the one-third rule negatively affects Texas court reporters throughout the competitive marketplace. Texas court reporters compete for business in an open market that is not restricted to Texas borders. In today's national and international marketplace, the one-third rate is arbitrarily low. The national average for copy rates is 57.12 percent of the price of the original,⁴ but Texas court reporters are mandated to charge not more than 33.3 percent. There is little economic incentive for new reporters or firms to seek Texas licensure or practice the profession in Texas. Not surprisingly, the number of court reporters in Texas has significantly declined since the implementation of the one-third rule.

The one-third rate is no longer reasonable or appropriate. Since the rule was adopted, certified reporting of testimony has undergone tremendous changes demanded by consumers of the service. For example:

- Consumers have demanded that reporters move from low-tech, manual recordation to high-tech capture of testimony and exhibits. The cost of that technology is high, and reporters must be permitted to recapture those additional costs through the fees they charge for their services.
- While changes in Texas law (such as tort reform) appear to have reduced demand for courtroom trials in Texas, arbitration and mediation remain active and continue to drive demand for discovery, including the taking of depositions. Further, litigation in other states drives demand for quality certified reporting services. These trends provide opportunities for Texas court reporters to provide service to their Texas clients in out-of-state and international venues by networking with reporters in other states to take depositions in Texas-filed cases. Unfortunately, Texas court reporters find it difficult to take advantage of this business opportunity. The rule inhibits Texas court reporters from building any cross-state-line coalitions. As a result, Texas court reporters give up their out-of-state work because they cannot recoup the copy cost charged by the out-of-state reporter, while the out-of-state reporters, so long as they do not affiliate with a Texas court reporter, may charge their going market rates to Texas attorneys. In

³ It is questionable whether the rule is aligned with Texas statutory law. Texas Government Code, Section 52.003(a) prohibits Texas Supreme Court rules that restrict "advertising or competitive bidding by a certification or registration holder except to prohibit false, misleading, or deceptive practices." The one-third rule does not allow for competitive pricing, which is contrary to the prohibition in this section.

⁴ A chart summarizing the national average for copy rates is attached as **Appendix A**.

short, Texas court reporters are harmed in the competitive marketplace and are losing much of their income and business opportunities to out-of-state reporting firms who are not restricted in the same manner.

Second, the one-third rule is an arbitrary financial limit. It is devoid of sound policy reasons. Only three other states impose any fee cap on copies, and Texas imposes the lowest of those caps, by far.⁵ In line with Texas's general policy favoring free markets over heavy government regulation, Texas court reporters should have the ability to charge fees for copies that reflect the prevailing market rate. Texas court reporters should have an equal opportunity to compete for business in their chosen profession and to challenge their competitors in the national and international marketplace, while making an appropriate return on their career and business investment.

TEXDRA does not request the rule be amended to allow court reporters to charge unlimited fees. Rather, the amended rule maintains the ethical obligation to charge reasonable rates and directs the JBCC to establish the maximum rate a court reporter may charge for copies after a study of the charges being made in the competitive marketplace. The proposed rule would bring a balance to legitimate competing concerns and curb any potential abusive rate-setting practices.

Respectfully,

/s/Craig T. Enoch
Craig T. Enoch

cc: Martha Newton, Rules Attorney

⁵ The three states that impose caps on charges for copies are West Virginia (W. VA. CODE § 47-27-2(b)(4): 55 percent of the original transcript), Michigan (MICH. COMP. LAWS § 600.1491(2)(b): two-thirds the price of the original transcript), and Arizona (ARIZ. REV. STATE. ANN. § 7-206(J)(3)(e): no less than 60 percent more for an original transcript than what is charged for copies). These statutes are attached as **Appendix B**.